

Ms. Jennifer Kennedy Gellie
Chief, FARA Unit
National Security Division
U.S. Department of Justice
175 N Street NE, Constitution Square Building Three –Room 1.100
Washington, DC 20002

Re: Comment on Advanced Notice of Public Rulemaking (RIN 1105-AB67)

Dear Ms. Gellie:

My name is Kate Sawyer Keane and I am a partner at Elias Law Group. For over a decade, I have advised a wide range of entities within the regulated community on issues related to compliance with the Foreign Agents Registration Act (“FARA” or the “Act”). Our firm currently advises various types of non-profit organizations, particularly charitable organizations, on the Act’s registration and reporting requirements.

I am submitting one comment related to a recurring issue that non-profit organizations face when seeking to comply with the Act. I recommend regulatory language affirming that the exemption for “activities not serving predominantly a foreign interest” applies to activity conducted on behalf of a non-profit organization, including charitable organizations and private foundations, so long as the activity is not directed by a foreign government or foreign political party and does not promote the public or political interests of a foreign government or foreign political party. These organizations, and their activities, often fall beyond the scope of the Act’s purpose to protect the national defense, internal security, and foreign relations of the United States.

I am available to discuss the comment with you or with personnel in the FARA Unit at your convenience. Please contact me at kskeane@elias.law.

Sincerely,



Kate Sawyer Keane
Partner
Elias Law Group LLP

ANPRM Question 5: What other changes, if any, should the Department make to the current regulations at 28 CFR 5.304(b) and (c) relating to the exemptions in 22 U.S.C. 613(d)(1) and (2)?

While the regulations provide clarity on a for-profit corporation's exemption from registration under 22 U.S.C. 613(d)(2) when activities are not directed by, and do not directly promote, a foreign government or political party, the regulations should affirm that the exemption also applies when a non-profit organization's activities are similarly not directed by, and do not directly promote, a foreign government or political party.

Section 613(d)(2) of the Act exempts from registration any person engaging or agreeing to engage only "in other activities not serving predominantly a foreign interest." The corresponding regulation states, "For the purpose of section 3(d)(2) of the Act, a person engaged in political activities on behalf of a foreign corporation, even if owned in whole or in part by a foreign government, will not be serving predominantly a foreign interest where the political activities are directly in furtherance of the bona fide commercial, industrial, or financial operations of the foreign corporation, so long as the political activities are not directed by a foreign government or foreign political party and the political activities do not directly promote the public or political interests of a foreign government or of a foreign political party."¹

The regulation should clarify that a person's activities for a foreign non-profit organization do not predominantly serve a foreign interest when the activities are directly in furtherance of the interests of the foreign non-profit organization, the activities are not directed by a foreign government or foreign political party, and the activities do not directly promote the public or political interests of a foreign government or foreign political party. For example, a U.S. person assisting a foreign foundation in issuing grants within the U.S., while a registrable activity under Section 611(c)(1)(iii), should be exempt under Section 613(d)(2) so long as the activities are neither directed by, nor directly promote the interests of, a foreign government or foreign political party.

First, the text of the Section 613(d) exemption is not limited to commercial activities. Both Sections 613(d)(2) and (d)(3) make no reference to commercial activity. Despite this, the Division has referred to Section 613(d)(2) as part of the "commercial exemption" and appears to have narrowed the scope of the exemption to activities described in 28 C.F.R. § 5.304(c).² Since the regulation has been interpreted as the entire scope of the exemption, it should be amended to clarify that other non-commercial actors could also be exempt when engaging in activity not predominantly serving a foreign interest. The Comment published February 9, 2022 raises the same concern addressed here and I agree with their assessment that the regulation as interpreted chills non-profit activities outside the goals of FARA disclosure.³

¹ 28 C.F.R. § 5.304(c).

² See Adv. Op. Oct. 2, 2019 (exemption was requested "pursuant to the 'commercial exemption' for engaging in 'activities not serving predominantly a foreign interest.' . . . The scope of the exemption is further delineated by FARA's implementing regulations [28 C.F.R. § 5.304(c)]").

³ Comment on FR DOC # 2021-26936, DOJ-LA-2021-0006-0005 at 5.

Second, the text of 28 C.F.R. § 5.304(c), and its interpretation through advisory opinions, make clear that “serving a foreign interest” in this context should be interpreted as activity that is directed by a foreign government or foreign political party, or directly promotes a foreign government’s or foreign political party’s public or political interests. If an entity is acting solely to further the interests of a foreign non-profit organization that has no direct connection to a foreign government or political party, and is not directly promoting a foreign government or foreign political party’s interests, then the entity is not “serving predominantly a foreign interest,” and registration should not be required.

The regulation explicitly exempts political activity on behalf of a foreign principal when it is conducted in furtherance of the foreign corporation’s commercial interests “so long as the political activities are not directed by a foreign government or foreign political party and the political activities do not directly promote the public or political interests of a foreign government or of a foreign political party.”⁴ Similarly, the Division’s opinions analyzing this exemption revolve around a connection to a foreign government or country, not merely a connection to a foreign principal. In Advisory Opinion Nov. 6, 2018, the Division found the company exempt under Section 613(d)(2), noting “[i]mportantly, we find that the political activities are not directed by [foreign government] or [foreign country], and the political activities undertaken by [US company] do not directly promote the public or political interests of a foreign government or foreign political party. We consider the benefits to be indirect and incidental to [US company]’s work promoting [conference], as long as [foreign government] and [foreign country] refrain from directing any of [US company]’s activities.”⁵

In order for the statutory exemption to properly include non-profit activity, language in the regulation is needed similar to that for commercial entities, permitting activities in furtherance of a foreign non-profit corporation “so long as the activities are not directed by a foreign government or foreign political party and the activities do not directly promote the public or political interests of a foreign government or of a foreign political party.”⁶

⁴ 28 C.F.R. § 5.304(c).

⁵ *See also*, Adv. Op. Feb. 9, 2018 (finding the person’s activities “serve predominantly a foreign interest in that they directly promote the public interests of [foreign country].”); *see also* Adv. Op. Aug. 15, 2018 (Section 613(d)(2) exemption does not apply “because these activities do serve a predominantly foreign interest, that of the [embassy of foreign country]”).

⁶ *See* 28 C.F.R. § 5.304(c).